Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	
Petition of Global NAPs, Inc., for	)	CC Docket No. 99-154
Pre-emption of the Jurisdiction of the New	)	
Jersey Board of Public Utilities Pursuant	)	
to Section 252(e)(5) of the	)	
Telecommunications Act of 1996	)	

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice dated May 7, 1999, AT&T Corp. ("AT&T") hereby submits these Comments on the Petition of Global NAPs, Inc. ("Global NAPs") for Pre-emption of the Jurisdiction of the New Jersey Board of Public Utilities pursuant to Section 252(e)(5) of the Communications Act, filed May 5, 1999 ("Petition").

In its Petition, Global NAPs asks the Commission to assume jurisdiction pursuant to § 252(e)(5) of the Act over a dispute with Bell Atlantic concerning Global NAPs' attempt to exercise its "pick and choose" rights under § 252(i). Although AT&T has no direct knowledge concerning the particular facts involved in Global NAPs' dispute with Bell Atlantic, and therefore takes no position on the merits of Global NAPs' specific claims, AT&T does wish to comment on two larger issues raised by the Petition that affect the entire industry and that threaten to inhibit the development of efficient local competition.

First, the Petition provides another illustration of the incentive and ability of incumbent LECs to exploit delays in the regulatory process to delay entry of potential competitors. According to the Petition, Global NAPs sought to subscribe to an existing Bell Atlantic interconnection agreement

pursuant to Section 252(i); Bell Atlantic refused the request; a state arbitrator issued a ruling in favor of Global NAPs; the state commission ordered the parties to submit an agreement reflecting the arbitrator's award; Bell Atlantic refused to cooperate; and the matter has since been pending before the state commission, without action, for eight months. *See* Petition at 1-3. The Petition thus highlights two specific areas of concern. Where a competitive LEC seeks to enter markets through its own arbitrated interconnection agreements, Bell Atlantic and other incumbent LECs often attempt to delay that entry through foot-dragging and outright refusals to submit interconnection agreements that conform to arbitrators' rulings. Where a competitive LEC chooses instead to enter by exercising opt-in rights under § 252(i), Bell Atlantic and other incumbents refuse to respond to the requests, or insist that the competitor first agree to textual modifications to the agreement (or a statement "clarifying" the agreement to reflect the incumbent's interpretation). These tactics can be successful if and to the extent that there is no mechanism to obtain prompt resolution of any resulting dispute, as the facts alleged in the Petition illustrate.

Accordingly, AT&T urges the Commission to: (1) affirm that it will not hesitate to exercise its Section 252(e) authority when a state fails to act to carry out its responsibilities "in a timely manner,"[1] on a claim that (a) a party to an arbitration decision is refusing to negotiate or join in the submission for approval of an agreement that conforms to that decision, or (b) an incumbent LEC has not responded in a timely and lawful manner to a competitive LEC's pick-and-choose request, and (2) establish a rebuttable presumption in § 252(e)(5) proceedings that a state's failure to act within three months in either of these situations is unreasonable.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act 1996*, First Report and Order, 11 FCC Rcd. 15499, 16128 (¶ 1285) ("*Local Competition Order*").

Second, the Petition provides still further evidence of the persistent campaigns of incumbent LECs across the country to evade the Commission's recently reinstated pick-and-choose rule. As AT&T has stressed in other pending proceedings, it is critical in these circumstances that the Commission strongly reaffirm and vigorously enforce section 252(i) and Rule 809 (47 C.F.R. § 51.809), the pick-and-choose rule.

The Global NAPs Petition highlights the need for additional Commission guidelines in connection with disputes presented to state commissions under § 252 of the Act. Congress expressly provided a remedy in § 252(e)(5) in the event of state inaction on a request under another provision of section 252. Specifically, § 252(e)(5) directs the Commission to "assume the responsibility of the State commission . . and act for the State commission" in "*any* proceeding or other matter under [Section 252]" in which a state commission "fails to act to carry out its responsibility" under that section. 47 U.S.C. § 252(e)(5) (emphasis added). In the *Local Competition Order* the Commission adopted national implementing rules to "give notice of the procedures and standards the Commission would apply" and to "avoid delay" should the Commission assume jurisdiction. *See Local Competition Order*, ¶ 1283. The Commission expressly defined a state's "failure to act to carry out its responsibility" under Section 252 as "a state's failure to complete its duties *in a timely manner*." *Id.*, ¶ 1285 (emphasis added).

The existing § 252(e)(5) rules, however, as the Commission itself has acknowledged, are merely "minimum, interim procedures." *Id.*, ¶ 1284. The Commission adopted only "minimum interim" rules both because it felt the need in 1996 to "direct its resources to more pressing matters that [fell] within the six-month statutory deadline" and because adopting interim rules would "allow the Commission to learn from the initial experiences and gain a better understanding of what types

of situations may arise that require Commission action." *Id.* For those reasons, the existing rules specifically address only the comparatively "simple" cases in which a state commission fails to respond to an arbitration or mediation request or to complete an arbitration proceeding within the time periods prescribed by the Act. *See id.* at ¶ 1285; 47 C.F.R. § 51.807; *but see* 47 C.F.R. § 51.801 (broadly authorizing FCC pre-emption for *any* state commission failure to carry out its responsibilities under Section 252).

In the intervening years, it has become clear that Commission guidance is needed in at least two additional areas where state failure to act can have substantial adverse consequences on the development of competition. Both are exemplified by Global NAPs's Petition: (1) where a state commission fails to act on a disputed pick and choose request, and (2) where a state commission fails to act on an incumbent's refusal to submit to the state commission an agreement that conforms to arbitration results (which, under § 252(e)(4), would trigger a 30-day deadline for approval or rejection).

State inaction in these two situations substantially harms competition. With respect to pick-and-choose elections, the Commission has previously recognized that the ability to opt into the terms of existing agreements is necessary to "speed the emergence of robust competition." *Local Competition Order*, ¶ 1313 (also recognizing that new entrants "stand to lose the most if negotiations are delayed"). A state commission's failure to act on a disputed pick-and-choose election, however, thwarts the core purpose of § 252(i) often by keeping a competitor out of the market (or, at a minimum, preventing a competing carrier from obtaining favorable terms available to others).

Global NAPs, for example, first sought to exercise its opt-in rights under § 252(i) over thirteen months ago, and the dispute over the arbitrator's award has been pending before the New

Jersey commission for over eight months. Petition at 3. AT&T has faced similar incumbent LEC stonewalling. Bell Atlantic, for one, routinely refuses to permit AT&T (and others) to exercise statutory pick-and-choose rights. *See, e.g.*, Letter from Amy D. Kanengizar, Bell Atlantic, to Mart Vaarsi, AT&T (April 7, 1999) (refusing to allow AT&T to exercise its rights under Section 252(i) of the 1996 Act until "the Eighth Circuit Court of Appeals has issued its mandate in respect of the U.S. Supreme Court's January 1999 decision in *Iowa Utils. Bd. v. FCC*"). Absent prompt corrective action by the state commission or this Commission, such delays effectively rob entrants of the core benefits of § 252(i) -- *i.e.*, the ability to enter the market quickly and the administrative efficiencies of opting into terms that have already been negotiated and arbitrated by others. In short, a state commission's failure to act when an incumbent LEC disputes the pick-and-choose election can effectively render § 252(i) and Rule 809 nullities.[2]

More broadly, the Global NAPs Petition illustrates that prompt state commission action -- and a Commission backstop in the absence of state action -- are needed to prevent incumbent LECs from creating an Achilles heel in the process established in the Act for interconnection agreement formation and approval. Notwithstanding that the nine month limit in § 252(a)(4) and the 30-day approval window in § 252(e)(4) leave no doubt that Congress intended prompt resolution of interconnection disputes, incumbent LECs have, in practice, often imposed substantial competition-foreclosing delay simply by refusing to agree to submit an agreement that conforms to the arbitrator's ruling. This appears to be Global NAPs' predicament: according to Global NAPs, Bell Atlantic simply refuses to submit a proposed agreement that conforms to the arbitrator's ruling in Global NAPs' favor, and the

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[2] Indeed, at thirteen months and counting, Global NAPs's attempt to use the "expedited" pick-and-choose procedures under Section 252(i) has taken longer than the statutory timeline for negotiating a new agreement from scratch.

New Jersey Board of Public Utilities has failed to act for over eight months in the face this intransigence. Some state commissions have refused to countenance such anticompetitive tactics and have, for example, ordered each party to submit a proposed agreement and then chosen one of the competing proposals. In other cases, however, the state commission has refused to intervene, remaining silent until a single agreement is jointly filed by the parties.

The direct effects of incumbent LEC foot-dragging in such circumstances are obvious -- competitive entry is delayed. The indirect effects are equally pernicious -- incumbent LECs frequently exploit their control over the timing of submission of an arbitrated agreement by turning the threatened delay into another bargaining chip. When that occurs, a competing LEC may have little choice but to make additional unwarranted concessions in an attempt to break the logjam and entice the incumbent to submit a conforming agreement. State inaction in such circumstances therefore undermines the twin purposes of the process established by § 252: mitigating the gap in bargaining power between incumbents and the new entrants that depend on them, and facilitating speedy entry through arbitrated agreements.[3] Commission guidance in these areas is especially critical now, because interconnection agreements all across the country are set to expire in the next year or so, and therefore carriers and state commissions are about to embark on a whole new round of arbitration proceedings.

A simple solution is available. The Commission should make clear that state commission inaction in the face of foot-dragging by an incumbent LEC with regard to submission of an arbitrated

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[3] This is not even the only such dispute Global NAPs has with Bell Atlantic. *See Petition of Global NAPs, Inc. for Preemption of the Jurisdiction of the Pennsylvania Public Utility Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 99-169 (filed May 10, 1999).

interconnection agreement for approval or accommodation of a pick-and-choose request may trigger Commission intervention through § 252(e)(5) proceedings. To give clear guidance to industry participants and state commissions, the Commission should also establish a rebuttable presumption in § 252(e)(5) proceedings that a state's failure to act within three months in either of these situations will be deemed a "failure to act." If the state commission fails to act within three months, the affected party could avail itself of the notification procedures laid out in Rule 803 (47 C.F.R. § 51.803), and other parties (including the state commission) would have an opportunity to rebut the presumption in favor of FCC jurisdiction in their Rule 803(a)(3) responses. The mere adoption of these clear guidelines and a renewed commitment that the Commission will not hesitate to step in whenever states fail to carry out their section 252 responsibilities "in a timely manner," *Local Competition Order* ¶ 1285, may discourage incumbents from engaging in the most extreme forms of intransigence, and encourage state commissions to exercise their jurisdiction.

Finally, the Petition also underscores the need for the Commission to promptly reaffirm and vigorously enforce its existing pick-and-choose rules. In recent months, incumbents have made numerous attempts to weaken the pick-and-choose rules and to impose anticompetitive limitations on entrants' ability to invoke their § 252(i) rights. *See, e.g., Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Reply Comments of AT&T Corp., pp. 18-21 (filed April 27, 1999) (rebutting such arguments); *Request for Declaratory Ruling Regarding the Use of Section 252 (i) To Opt Into Provisions Containing Non-Cost-Based Rates*, CC Docket No. 99-143, Comments of AT&T Corp. (filed May 17, 1999) (rebutting GTE request for declaratory ruling). In this regard, Bell Atlantic's refusal to honor Global NAPs's pick-and-choose election is typical of its

brazen disregard of § 252(i) and the Commission's rules throughout its region. The Commission should strongly reaffirm that both § 252(i) and Rule 809 mean what they say, and that incumbents must make the terms of their interconnection agreements available to other competing LECs.

Respectfully submitted,

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May 24, 1999

CERTIFICATE OF SERVICE

I, Anishiya Abrol, do hereby certify that, on this 24th day of May, 1999, I served a copy of the attached document via First Class mail and facsimile on the following parties:

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